

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 20-0549

CECIL LEWIS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: 02/17/2021
HUNTINGTON INGALLS INDUSTRIES)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Monica Markley, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for Claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for Self-insured Employer.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Monica Markley's Decision and Order (2018-LHC-00214) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant began working for Employer on September 23, 1980, undergoing pre-employment audiometric testing the day before. He has operated a forklift for over 30

years and, as of the date of the hearing, was still working for Employer. Tr. at 11-13. He was exposed to noise during the course of his employment and underwent 14 audiograms. EX 7. His pre-employment audiogram demonstrated essentially normal hearing. EXs 5, 7. His 2008 audiogram demonstrated mild, but symmetrical, loss. EX 7. Claimant's next audiogram, in 2010, established markedly different, and asymmetrical, hearing loss with the right ear being far worse than the left, particularly in the lower frequencies. *Id.* His 2014 audiogram recorded severe to profound right ear hearing loss at all frequencies and mild hearing loss in his left ear, with no overlapping readings and no symmetry in the graph. *Id.* In March and June 2017, Claimant's audiograms revealed continued asymmetrical hearing loss with mild to moderate hearing loss in his left ear and severe to profound hearing loss in his right ear. *Id.*; EX 5. Claimant filed a claim for compensation for hearing loss in 2017.

Based on the assessment of its audiologist, Dr. Helen Dennie, Employer initially accepted liability for a 7.5 percent monaural left ear hearing loss. It paid Claimant compensation and hearing aid expenses. CXs 2-3; CX 9 at 5; JX 1. It later agreed to pay Claimant benefits for a 7.5 percent binaural hearing loss based on the June 2017 audiogram, as Dr. Dennie opined the right ear hearing loss was likely to be noise related only to the degree it matched Claimant's left ear hearing loss (7.5 percent). CX 9 at 34-35; JX 1. Employer refused to pay for any greater hearing loss in Claimant's right ear. JX 1.

Before the administrative law judge, Claimant asserted he has a pre-existing loss in his right ear in addition to his subsequent noise-induced loss and is entitled to benefits for his entire hearing loss in accordance with the aggravation rule. The administrative law judge disagreed. She stated his asymmetrical right ear hearing loss is not work-related and did not pre-date his employment, distinguished the cases Claimant cited as authority, and found Claimant is not entitled to any additional benefits beyond those for the agreed-upon 7.5 percent binaural hearing loss. Decision and Order at 11-15. Claimant appeals, and Employer urges the Board to affirm the administrative law judge's decision.

Claimant contends the administrative law judge erred by failing to apply the aggravation rule. Claimant asserts his pre-existing hearing loss is established by the audiogram dated July 15, 2010, which shows a right-sided hearing loss. Cl. Br. at 5-6; EX 7. Because the audiogram dated June 21, 2017, showed a 7.5 percent noise-induced binaural hearing loss, in addition to the significant pre-existing right ear hearing loss, Claimant asserts the aggravation rule applies, and he is entitled to benefits for his entire hearing loss.¹ Cl. Br. at 6.

¹ The record does not contain interpretations of the audiograms under the American Medical Association *Guides to the Evaluation of Permanent Impairment*, but Claimant's

Under the aggravation rule, an employer is liable for the entire resultant disability where the claimant's employment-related injury contributed to, combined with, or aggravated a pre-existing or underlying condition. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc); *Indep. Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). The aggravation rule applies to hearing loss injuries and requires the employer to pay for the entire combined hearing loss. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991) (employment injury may worsen the underlying impairment or may combine in an additive way); *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982); *Epps v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 1 (1986); *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986); *Primc v. Todd Shipyards Corp.*, 12 BRBS 190 (1980).

In her September 2017 report, Dr. Dennie described Claimant's asymmetric right ear hearing loss as "severe to profound mixed hearing loss, with 0% word recognition ability [which] is not consistent with chronic, noise exposure. . . ." EX 5. Dr. Dennie testified at her deposition in April 2018 that the right ear hearing loss was likely to be noise related only to the degree it matched Claimant's left ear hearing loss (7.5 percent). CX 9 at 34-35. The administrative law judge gave great weight to Dr. Dennie's opinion. Decision and Order at 13. Because Claimant's pre-existing condition did not pre-date his employment, the administrative law judge found it did not comport with the typical hearing loss aggravation cases, and she found the aggravation rule does not apply. Decision and Order at 14. This conclusion is in error.

A condition need not pre-date a claimant's employment in order to constitute a "pre-existing" condition for purposes of the aggravation rule. Rather, it need only pre-date the work-related injury. See *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *Risch v. Gen. Dynamics Corp.*, 22 BRBS 251 (1989). In this case, there is clear and undisputed audiometric evidence of Claimant's right ear hearing loss, albeit of unknown etiology per Dr. Dennie, prior to the development of a compensable, work-related, noise-induced, hearing loss. CX 9 at 9; EXs 5, 7. When a work-related hearing loss combines with a pre-existing hearing loss in an additive way, it is compensable under the aggravation rule.²

hearing was evaluated at the necessary hertz levels. 33 U.S.C. §908(c)(13)(E); see *Green-Brown v. Sealand Services, Inc.*, 586 F.3d 299, 43 BRBS 57(CRT) (4th Cir. 2009).

² As the Board explained in earlier decisions: "Normally, when an individual suffers a loss of hearing in one ear, the second ear is able to compensate for most of the loss in the first ear and the injured person maintains an adequate degree of hearing capability." *Primc v. Todd Shipyards Corp.*, 12 BRBS 190, 193 (1980). Also, "because claimant already had a substantial hearing loss in his right ear, his right ear was not able to compensate for [any]

Port of Portland, 932 F.2d at 839, 24 BRBS at 141(CRT); *see also Fishel*, 694 F.2d at 330, 15 BRBS at 58(CRT). Consequently, we vacate the administrative law judge's finding that Claimant is limited to an award of benefits for a 7.5 percent binaural hearing loss. *Id.*; *Primc*, 12 BRBS at 193. Therefore, we remand the case for the administrative law judge to award hearing loss benefits consistent with the aggravation rule. *Epps*, 19 BRBS at 3; *Worthington*, 18 BRBS at 201.

Accordingly, we vacate the denial of additional benefits and remand the case for further consideration consistent with this decision.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

work-related hearing loss. . . .” *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200, 201 (1986).